

Explanatory Memorandum

Thurrock Flexible Generation Plant

Application document number A3.2, [version 3 for Deadline 2 \(March 2021\)](#)



The Thurrock Flexible Generation Plant Development Consent Order 202[]

EXPLANATORY MEMORANDUM

Planning Act 2008	
The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009	
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1 SUMMARY

1.1 This memorandum explains the purpose and effect of each article of, and Schedules to, the draft Thurrock Flexible Generation Plant Development Consent Order (the "**Order**"), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009¹.

1.2 Regulation 5(2)(c) requires explanatory memoranda to explain "*the purpose and effect of provisions in the draft order*".

2 PURPOSE OF THE ORDER

2.1 Thurrock Power Limited (the "**undertaker**") is applying to the Secretary of State for a development consent order for the Thurrock Flexible Generation Plant, at Tilbury, Thurrock, Essex (the "**Project**").

2.2 In summary the Project consists of a flexible generating station comprising:

- reciprocating gas engines with an electrical output totalling 600 MW;
- batteries with an electrical output of 150 MW and storage capacity of up to 600 MWh;
- gas and electricity connections;
- creation of temporary and permanent private access routes for construction and access in operation, including a permanent causeway for the delivery of abnormal indivisible loads (AILs) by barge;
- works to create exchange Common Land; and
- habitat creation or enhancement for protected species translocation and biodiversity gain.

2.3 The proposed development is located on land south west of Station Road near Tilbury, Essex. The British National Grid coordinates are TQ662766 and the nearest existing postcode is RM18 8UL. It is within the administrative area of Thurrock Borough Council (TBC) and lies in the Green Belt.

2.4 A detailed description of the Project is included in Chapter 2 of Volume 2 of the Environmental Statement ([application document A.6.2.3ref PDC-015](#)).

¹ S.I. 2009/2264

Nationally Significant Infrastructure Project

- 2.5 The Project is a nationally significant infrastructure project ("**NSIP**") within sections 14(1)(a) and 15 of the Planning Act 2008 (the "**2008 Act**"). Under section 15(2) a generating station is an NSIP if:
- (a) it is in England,
 - (aa) it does not generate electricity from wind,
 - (b) it is not an offshore generating station, and
 - (c) its capacity is more than 50 megawatts.
- 2.6 The Project is an onshore generating station in England which does not generate energy from wind, and which has an export capacity of 750MW. It accordingly falls within section 15(2).
- 2.7 As the Project is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the 2008 Act.
- 2.8 Schedule 1 (Authorised Development) to the draft Order contains a list of numbered works comprising the Project.

Associated development

- 2.9 The draft Order specifically authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP ("**associated development**").
- 2.10 Guidance on associated development has been issued by the Secretary of State². In this guidance associated development is described as being "*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*" (paragraph 6) and requiring "*a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*" (paragraph 5).
- 2.11 In some cases there may be some overlap between associated development and works which form part of the NSIP. All elements of the proposed development either constitute

² 'Guidance on associated development applications for major infrastructure projects' (Department for Communities and Local Government) (April 2013)

part of the NSIP or are associated development within the meaning of section 115(2) of the 2008 Act, and so can properly be authorised by the Order.

3 ANCILLARY MATTERS

- 3.1 The draft Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 3.2 In addition to providing for the construction and operation of the authorised development, the Order will, in accordance with section 122, section 120(3) and Schedule 5 of the 2008 Act, authorise the acquisition of land and rights over land, and the extinguishment of, or interference with, interests in or rights over land. The Book of Reference (application document A4.3) sets out a description of the land and interests included in the Order. The Order and the Book of Reference should be read together with the Statement of Reasons (application document A4.2) which accompanies the Application and sets out the justification for the acquisition or interference with the Order land.
- 3.3 Other ancillary matters include the application and disapplication of legislation, the power to undertake works to streets, the suspension of traffic regulation orders, the ability to take temporary possession of land and a deemed Marine Licence.

4 THE DRAFT ORDER

- 4.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009³ has been repealed, the draft Order is based on the model provisions as well as other development consent orders that have been made to date.

Part 1 – Preliminary

Article 1 - Citation and commencement

- 4.2 Article 1 sets out the name of the Order and the date on which it comes into force.
- 4.3 This article did not appear in the model provisions. However, it is a standard article that is included in all development consent orders.

Article 2 - Interpretation

- 4.4 Article 2(1) defines the terms used in the Order. It is a standard article and was included in the model provisions as article 1.
- 4.5 Definitions to note include:

³ S.I. 2009/2265

- (a) "Commence". This definition scopes out a number of permitted preliminary works:

"permitted preliminary works" means all or any of—

- (a) environmental surveys, geotechnical surveys, intrusive archaeological surveys and other investigations;
- (b) above ground site preparation for temporary facilities for the use of contractors;
- (c) the provision of temporary means of enclosure and site security for construction;
- (d) the temporary display of site notices or advertisements;
- (e) protected species relocation in accordance with a relevant licence;
- (f) infilling of ditches and creation of new ditches; and
- (g) site clearance (including vegetation removal, vegetation management to create or enhance habitat);

The permitted preliminary works include surveying and investigatory work necessary to inform the detail of construction. They also include reversible works such as fencing and works required to prepare the site prior to commencement of construction but which do not require to be controlled through the detailed requirements.

In this case, the undertaker seeks the ability to undertake works to relocate water vole without triggering commencement, including creating new ditches and infilling ditches which are to be closed to prevent return. This work requires to be carried out in the correct season and ahead of main construction. This work will be controlled through a protected species licence. This approach is precedented in the Drax DCO⁴.

- (b) "Maintain". A definition of "maintain" has been added to make clear what is authorised under article 5, and that this does not permit the undertaker to depart from the description of the authorised development in Schedule 1 or to carry out maintenance operations which would cause different environmental effects to those identified in the ES.

⁴ The Drax Power (Generating Stations) Order 201 9

- (c) "Order limits" which means the red line boundary for the Project as shown on the works plans and the land plans.
 - (d) The "undertaker" is defined as Thurrock Power Limited, who has the benefit of the provisions of the Order.
- 4.6 Article 2(2) expands the definition of rights over land. This was included in the model provisions as article 1(2).
- 4.7 Articles 2(3) and 2(4) define measurements as approximate. The purpose of this is to ensure that if upon construction of the works it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the Order permits the works. Thus this provision allows for a small tolerance, although all works will take place within the limits of deviation. It is now common practice to include such provision in development consent orders and the model provisions included similar wording in article 1(3). Article 2(7) provides that areas given in the book of reference are approximate, since these are not covered by article 2(3).
- 4.8 Article 2(6) confirms that references to works are to the works numbered in Schedule 1.

Part 2 Principal Powers

Article 3 – Development consent etc. granted by the Order

- 4.9 Article 3 provides the principal power to construct and operate the authorised development within the Order limits. Schedule 1 describes the authorised development.
- 4.10 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on article 2 of the model provisions, with the only substantive difference being that article 3 does not refer to consent being granted for ancillary works.

Article 4 – Limits of deviation

- 4.11 Article 4 confirms that in carrying out the Project the undertaker may:
- (a) deviate laterally from indicative centrelines or situations of the authorised development shown on the works plans to the extent of the limits of deviation for each work shown on those plans; and
 - (b) deviate vertically from the levels shown on the illustrative cross section plans—
 - (i) upwards only within the parameters for the relevant work set out in table 1 in requirement 4; or
 - (ii) downwards to any distance.

- 4.12 Lateral deviation from the indicative locations may only be within the area for that work. For example, Work 6 (access road) is shown with an indicative centerline but may be located anywhere within the area shown for deviation of Work 6. This is necessary to allow micro siting of the route with regard to constraints, including the proximity of a rail line and National Grid infrastructure in situ, with the objective of minimizing land take and avoiding any sensitive ecology.
- 4.13 This wording was not included in the model provisions, but has become common wording in development consent orders. The ability to deviate within the prescribed limits of deviation is important to ensure that, if the precise 'as built' alignments or elevations are slightly different to those indicatively shown on the application plans, no question arises as to whether or not the works are permitted by the Order. The detailed design of the Project will take place following the grant of the Order (see Requirement 4) and the limits of deviation therefore ensure that the undertaker and its contractor have sufficient flexibility to design and construct the Project post consent.
- 4.14** The limits of deviation referred to in this article and shown on the application plans have been taken into account in the preparation of the Environmental Statement and the potential impacts of a deviation within the permitted limits have been assessed.

Article 5 - Maintenance of authorised development

- 4.15 This article sets out the scope within which the undertaker may maintain the development. The definition of "maintain" is contained in article 2(1). Article 5 was included in the model provisions as article 3.
- 4.16 Powers of maintenance are subject to the other provisions of the Order and any agreements made under the Order.

Article 6 Operation of generating station

- 4.17 Article 6 provides the principal power to construct and operate the Project within the Order limits. Schedule 1 describes the authorised development.
- 4.18 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on article 2 of the model provisions, with the only substantive difference being that article 6(1) does not refer to consent being granted for ancillary works.
- 4.19 Article 6(2) provides that grant of development consent does not relieve the undertaker of the need to obtain any other necessary consents to operate the ~~NSIP~~-authorised development. This clarifies that the operator will still require to obtain, for example, an electricity generation licence under the Electricity Act 1989. A list of the other consents

and licences anticipated to be required is set out in the Other Consent and Licences Statement⁵.

Article 7 Benefit of Order

- 4.20 Article 7 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to the undertaker rather than anyone with an interest in the land. It would be impractical for a variety of landowners to implement the Order.
- 4.21 The purpose of paragraph 7(2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. where works are required to connect to National Grid infrastructure and National Grid may wish to be able to undertake all or part of those works. Without this provision there would be a contradiction, since strictly speaking only the undertaker could benefit from these works.
- 4.22 Paragraph (1) is based on article 4 of the model provisions, amended to clarify that it is subject to paragraph (2) and that it is the undertaker that benefits from the provisions of the Order, rather than particular articles applying for the benefit of other specified parties as per the model provisions. Paragraph (2) was not included in the model provisions but has been included in a number of previous orders⁶.

Article 8 - Consent to transfer benefit of Order

- 4.23 This article allows the benefit of the Order to be transferred or leased to others by the undertaker. This article is necessary to allow the undertaker commercial freedom to sell or lease the project while ensuring that the Secretary of State can control such sale or lease through the need to obtain their consent. Without the ability to transfer the benefit, no party but the undertaker could operate the power station without committing a criminal offence. This article is therefore necessary to ensure that the project is fundable and could be sold or leased in the future.
- 4.24 The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were exercised by the undertaker. The consent of the Secretary of State is required for a transfer or grant, except where it is made to a specified categories of person.
- 4.25 Specifically, consent is not required to transfer the benefit to a holder of an electricity generating licence. The benefit of the Order as regard the gas pipeline and connection infrastructure (Works 4 and 5) may be transferred to persons holding a gas transporter licence. As these transfers are restricted to persons holding appropriate licences, such persons will already have been determined to be fit to operate such facilities.

⁵ Application document A7.7

⁶ Article 6 of The Eggborough Gas Fired Generating Station Order 2018, Article 6 of the Drax Power (Generating Stations) Order 2019,

- 4.26 The ability to transfer the benefit for any new highway to the highway authority allows for areas of new highway, for example at junctions connecting the projects private accesses into local highways, to be transferred. This may be required for small areas of junction where the Project connects into the highway at Station Road.
- 4.27 This article is based on article 5 of the model provisions. It differs in that it allows a transfer or grant to a specified licence holders to take place without the Secretary of State's consent, on the basis that it is appropriate for those companies to be able to carry out those works.

Article 9 - Defence to proceedings in respect of statutory nuisance

- 4.28 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates' court under section 82(1) of the Environmental Protection Act 1990 in relation to certain nuisances set out in paragraph 79(1) of that Act.
- 4.29 A broad defence to civil and criminal proceedings for nuisance is provided by section 158 of the 2008 Act. However, the view taken under the NSIP regime is that section 158 does not extend to the relatively rare situation by which if, somebody considers that the local authority ought to be tackling a nuisance using its statutory nuisance powers, but it is not, that person may apply to the magistrates' court under section 82 of the Environmental Protection Act 1990. Accordingly, this article is seeking to fill in a legislative gap by extending the effect of section 158.
- 4.30 As section 158 does not distinguish between different types of nuisance, the logical position is that this article should apply to all categories of nuisance. However, as a matter of practice other Projects have been more discriminating and have asked whether there is any possibility of a statutory nuisance occurring, leading to specific types of nuisance being referred to. The undertaker has followed this approach by seeking to restrict the application of this article so that it only applies to nuisances that have been identified as potentially resulting from the Project, as set out in the Statutory Nuisances Statement⁷ accompanying the application. This ensures that this article is focused only on those nuisances that may be of relevance, whilst also reflecting the logic and correct interpretation of section 158.
- 4.31 The defence is available if the nuisance relates to:
- (a) the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the Project and is attributable to the carrying

⁷ Application document A7.1

out of the Project in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or

- (b) the construction, maintenance or use of the Project and cannot reasonably be avoided.

4.32 This article is based on article 7 of the model provisions and recent orders⁸. The references to section 65 of the Control of Pollution Act 1974 are omitted because that section has been repealed.

Article 10 Disapplication of legislation etc

4.33 This article provides for the disapplication of certain requirements which would otherwise apply under public general legislation, as well local legislation as authorised by section 120(5)(a) of the Act (what may be included in order granting development consent)). Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the Order.

4.34 The article and many of the inclusions in it are the same as those granted in the Port of Tilbury DCO⁹ which is located in close proximity to the Project. ~~The Port of London Act is disappplied in order that river works and dredging licences are not required by the Project for the construction of the causeway (Work 10). This is in order to streamline consenting and prevent inconsistency between the conditons of various consents for the Project. A licence will required for the retention of the causeway post construction and discussion on that has been undertaken with the Port of London Authority ("PLA"). As a consequence of the disapplication, protective provisions for the benefit of the PLA are set out in Schedule 9.~~

4.35 Article 10(1)(~~ba~~), (~~eb~~) and (~~dc~~) disapply byelaws where the carrying out of the Project would conflict with such byelaws.

4.36 Regulation 12 [of the Environmental Permitting \(England and Wales\) Regulations 2016](#) is disappplied in order that flood risk activity permits are not required by the Project for the construction the Project. As a consequence of the disapplication, protective provisions for the benefit of the Environment Agency are set out in Schedule 9 and provide, in particular, that the works undertaken to the sea defence wall to allow access to the causeway must maintain or exceed the current levels of flood defence.

4.37 Article 10(1)(~~ef~~) provides for the disapplication of consents ordinarily required in respect of the Land Drainage Act 1991. Specifically, these are the requirements for consents for

⁸ See for example article 49 of the Port of Tilbury (Expansion) Order 2019 which concerns land in close proximity to the Project, Article 37 of The Eggborough Gas Fired Generating Station Order 2018.

⁹ See article 3 of the Port of Tilbury (Expansion) Order 2019

the construction of culverts, together with the requirements for approval under byelaws made under the Land Drainage Act 1991. These are consents for activities which may be a necessary part of constructing the Project. To provide certainty that the Project can proceed, the Order disapplies the requirement for a separate statutory consent to be obtained in relation to these activities.

[4.38](#) Article 10(1)(~~f~~^g) disapplies the provisions of the Neighbourhood Planning Act 2017 relating to the temporary possession of land. This is on the basis that the temporary possession of land is dealt with by articles 28 and 29 and the wording of those provisions is well established. The 2017 Act provisions differ from those in the Order and are untested, as they are not yet in force, it is therefore necessary to disapply them in case they should come into force in the future.

~~4.38~~[4.39](#) The Port of London Act is disapplied by article 10(2) in order that river works and dredging licences are not required by the Project for the construction of the causeway (Work 10). This is in order to streamline consenting and prevent inconsistency between the conditons of various consents for the Project. A licence will required for the retention of the causeway post construction and discussion on that has been undertaken with the Port of London Authority (“PLA”). As a consequence of the disapplication, protective provisions for the benefit of the PLA are set out in Schedule 9.

~~4.39~~[4.40](#) Article 10(~~2~~³) specifies that any building to be constructed is one into which people do not normally go or which they enter intermittently to inspect machinery. This because the Project will be operated remotely and the level of workforce will not justify a need for provision of community infrastructure to support that operation.

Part 3 Streets

Article 11 – Street works

~~4.40~~[4.41](#) Article 11 allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the Project. The authority given by this article is a statutory right for the purposes of sections 48(3) and 51(1) of the New Roads and Street Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this article, subject to the provisions of article 12 (application of the 1991 Act).

~~4.41~~[4.42](#) Article 11 is based on article 8 of the model provisions and article 11 of the M4 order. It departs from the model provisions in that it authorises interference with any street within the Order limits, rather than just those specified in a schedule. The application of sections 54 to 106 of the New Roads and Street Works Act 1991 is also expressed to be subject to article 12, which applies and modifies that Act. The definition of ‘apparatus’ that

was included as paragraph (4) in the model provisions is omitted because that term is already defined in article 2.

Article 12 – Application of the 1991 Act

~~4.42~~~~4.43~~ Article 12 provides for the application of the New Roads and Street Works Act 1991. Although not included in the model provisions, there is precedent for these provisions in previous orders¹⁰.

~~4.43~~~~4.44~~ Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order are to be "major highway works" for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if carried out by the highway authority) will apply in respect of the works authorised by the Order, irrespective of who carries them out.

~~4.44~~~~4.45~~ Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order and the specific provisions in the Order which regulate the carrying out of the Order works.

~~4.45~~~~4.46~~ Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily stopped up, altered or diverted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily affected street are 'street works' for the purposes of the 1991 Act; and secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.

Article 13 - Temporary restriction of use of streets

~~4.46~~~~4.47~~ This article allows for the temporary alteration, diversion or restriction of streets for the purposes of the Project, whilst ensuring that essential pedestrian access to and from premises along that street is maintained if necessary (paragraph (4)). This power is required because it is necessary in two locations to be able to restrict the use of the street in order to allow installation of the gas pipeline. In those cases, full width closures are likely to be required. Closures and traffic management may also be required to facilitate the creation or improvement of junctions, for example the creation of junction of the new access road to Station road and to improve access to the habitat enhancement land.

¹⁰ See for example article 9 of the Port of Tilbury (Expansion) Order 2019.

Where possible and safe, closures for access junction works will be partial only and not close the full width of the carriageway.

~~4.47~~4.48 Paragraph (2) confers a power on the undertaker where a street has been temporarily stopped up under this article to use it as a temporary working site. It is not anticipated that any street would be used as a working site except when undertaking works affecting the carriageway itself.

~~4.48~~4.49 Under paragraph (3) the consent of the street authority is required where the undertaker is not the street authority. The street authority may attach reasonable conditions to any consent, but must not unreasonably withhold or delay consent.

~~4.49~~4.50 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article. The undertaker is not aware of any private rights of way in streets however this article is retained as precautionary in the case that unidentified, extant title rights to take exist along the same lines as the current public highway.

~~4.50~~4.51 Paragraph (7) states that a street authority which fails to notify the undertaker of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. This time limit is considered necessary to remove the possibility for delay and provide certainty that the Project can be delivered by the undertaker in a timely fashion. As a nationally significant infrastructure project the Project should not be at risk of being held up due to a failure to respond to an application for consent.

~~4.51~~4.52 This provision has been included in numerous previous orders¹¹.

Article 14 - Access to works

~~4.52~~4.53 This article allows accesses to be created within the Order limits. It is anticipated that this article will be relied on by the undertaker to provide temporary accesses as required during the construction period, with all permanent means of access (including private means of access) forming part of the Project. This article departs from the model provisions (article 12) to provide the undertaker with a general power to provide means of access, for example to access land from Fort Road for the carrying out of Works 13 (for example to install footings for the footbridge) should that be necessary or expedient.

~~4.53~~4.54 The inclusion of this article is considered to be appropriate as it will help to ensure that the Project can be carried out expeditiously by allowing the undertaker to create new temporary accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.

¹¹ See for example article 14(6) of the M20 order and article 14(6) of the A14 order.

Article 15 - Traffic regulation

~~4.54~~4.55 The purpose of paragraphs (1) and (3) of this article is to provide the undertaker with powers to suspend certain existing traffic ~~management measures~~regulation orders (e.g. restrictions on the use of roads) where that is necessary to construct the Project. The list of traffic regulation orders that may be suspended is included in column 3 of Schedule 3 to the Order.

~~4.55~~—Article 15~~(3)~~ would, at any time up to 12 months after the ~~completion~~ commencement of operation of the Project, allow the undertaker, ~~in so far as it is necessary or expedient for the purposes of the construction, maintenance or operation of the Project,~~ to:

~~4.56~~—(a)—revoke, amend or suspend in whole or in part any order (not listed in Schedule 3) made or having effect under the Road Traffic Regulation Act 1984;

~~4.57~~—(b)—~~permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;~~

~~4.58~~—(c)—~~authorise the use as a parking place of any road;~~

~~4.59~~—(d)—~~make provision as to the direction or priority of vehicular traffic; and~~

~~4.60~~4.56—(e)—~~permit or prohibit vehicular access to any road.~~

~~4.61~~4.57 Under paragraph ~~(3)~~ any restriction etc. made before the end of the 12 month period may continue to have effect after that period has expired.

~~4.62~~4.58 Implementation of any of the measures is subject to the consent of the traffic authority in whose area the roads are situated. Requirement is made in paragraphs ~~(2)~~, ~~and (5)~~ and (6) for the chief officer of police and the relevant traffic authority to be consulted and notified in advance.

~~4.63~~4.59 Any restrictions etc. may be suspended, varied or revoked by the undertaker within a period of 24 months from the opening of the Project (paragraph ~~(7)~~(8)).

Part 4 – Supplemental powers

Article 16 - Discharge of water

~~4.64~~4.60 This article sets out the circumstances in which the undertaker is entitled to discharge water into a watercourse, public sewer or drain, and its purpose is to establish statutory authority for doing so.

~~4.65~~4.61 The effect of paragraph (3) is that this can only be done with the consent of the owner. Consent can be given subject to reasonable terms and conditions, but cannot be unreasonably withheld.

~~4.66~~4.62 Paragraph (5) requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.

~~4.67~~4.63 This article is the same as that set out in previous DCOs^{12 13}.

Article 17 - Authority to survey and investigate the land

~~4.68~~4.64 This article gives the undertaker the power to enter land for the purpose of surveying and investigating. It provides that the undertaker must give 14 days' notice before exercising the powers of entry. Compensation is payable for any loss or damage caused. Paragraphs (1) to (5) were included in the model provisions as article 16.

~~4.69~~4.65 Paragraph (6) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused. This paragraph was included in the Silvertown Tunnel DCO¹⁴ and Port of Tilbury DCO¹⁵.

Article 18 - Removal of human remains

~~4.70~~4.66 This article requires the undertaker, before it carries out any development or works which will or may disturb any human remains, to remove those remains. This article is included on a precautionary basis in case human remains are discovered while carrying out the Project.

~~4.71~~4.67 Without this article, authorisation from the Secretary of State for Justice would be required to remove remains. The Article sets out a process of notification of the discovery of remains and for their removal and reinternment or cremation. The removal of any remains is required to be carried out in accordance with any directions which may be given by the Secretary of State. Article 18 follows model provision 17 and was included in the Glyn Rhonwy DCO¹⁶.

Part 5 - Powers of Acquisition

Article 19 - Compulsory acquisition of land

¹² Article 18 of The Port of Tilbury (Expansion) Order 2019.

¹³ Article 14 of The Eggborough Gas Fired Generating Station Order 2018

¹⁴ Article 16 of The Silvertown Tunnel Order 2018

¹⁵ Article 19 of The Port of Tilbury (Expansion) Order 2019.

¹⁶ Article 34 of The Glyn Rhonwy Pumped Storage Generating Station Order 2017

~~4.72~~4.68 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire the land that is required for the Project. This is subject to articles 22 (compulsory acquisition of rights), 25 (acquisition of subsoil etc), 28 (temporary use of land for carrying out the Project) and 33 (special category land), which are explained below.

~~4.73~~4.69 Article 19 is based on article 18 of the model provisions. This power applies not just to the main site of the generating station but all of the land required for the project. This is because with the land required for the accesses, gas pipeline and gas compound the project could not be constructed or operated. Powers of acquisition are needed for the replacement common land to ensure that the statutory test can be met should the main site be compulsorily acquired. Power to acquire other elements including the habitat enhancement land is required as these elements must be able to delivered for the project to be acceptable in environmental and ecological terms.

Article 20 - Statutory authority to override easements and other rights

~~4.74~~4.70 Article 20 sets out that, by virtue of section 158 of the 2008 Act, in carrying out or using the development authorised by the Order and doing anything else authorised by the Order, the undertaker may interfere with any easement, liberty, privilege, right or advantage annexed to land and affecting other land, including any natural right to support, or breach any restriction as to use of land arising by virtue of contract. It also provides that compensation may be payable under section 10 of the Compulsory Purchase Act 1965 for any such interference or breach.

~~4.75~~4.71 Without this provision, the undertaker could be prevented from carrying out the development by rights attaching to land. In order to remove that risk, the undertaker would have to acquire the land so that any existing rights which cannot be accommodated by the development were extinguished. By including an authority to override rights (subject to paying compensation), the undertaker minimises interference with the rights of others by reducing the extent of compulsory purchase required to ensure that the project can be delivered.

~~4.76~~4.72 This is not a model provision, but is added to clarify the position with regard to rights burdening land required for the authorised development¹⁷.

Article 21- Time limit for exercise of authority to acquire land compulsorily

~~4.77~~4.73 This article gives the undertaker five years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under

¹⁷ This was included as article 18 of Eggborough Gas Fired Generating Station Order 2018, and preceded for that order in the Rookery South (Resource Recovery Facility) Order 2011 and the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. The reference to restrictions as to use of land arising in contracts was included in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014

the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.

~~4.78~~4.74 The article also sets a five year time limit on the power to take temporary possession of land under article 28, although it does not prevent the undertaker from remaining in possession of land after that time if it took possession within the five year limit.

~~4.79~~4.75 This article was included in the model provisions as article 20.

Article 22 - Compulsory acquisition of rights

~~4.80~~4.76 This article allows for rights over land to be acquired as well as the land itself, and also for new rights to be created over land. This includes the power to impose restrictive covenants. The public benefit of this is that it would allow the undertaker to reduce the area of outright acquisition if possible and rely on rights instead.

~~4.81~~4.77 Paragraph (2) provides that for the land described in Schedule 5, the undertaker's powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition of such restrictive covenants, as set out in that Schedule.

~~4.82~~4.78 The power to impose restrictive covenants will allow for the possibility of reducing the area of outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest.

~~4.83~~4.79 Paragraph (3) provides that where the undertaker only needs to acquire rights over land it is not obliged to acquire any greater interest in that land.

~~4.84~~4.80 Paragraph (4) applies Schedule 7, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation code applies to the additional categories of acquisition covered by the Order and the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).

~~4.85~~4.81 Article 22 is based on article 21 of the model provisions. It differs from the model provisions in the following respects:

- (a) Paragraph (1) allows the undertaker to acquire existing rights and create new rights over any of the Order land. Although the undertaker has sought to identify all of the plots which are to be subject to the acquisition or creation of rights and has set these out in Schedule 5, this provision ensures that the undertaker retains

the flexibility to acquire or create rights over land where that land might otherwise have to be acquired outright.

- (b) Paragraph (2) is included to clarify that the land identified in Schedule 5 may only be subject to the acquisition or creation of rights or imposition of restrictive covenants, and may not be subject to outright acquisition.
- (c) Paragraph (4) refers to Schedule 2A of the Compulsory Purchase Act 1965, as modified by Schedule 7, rather than section 8 of the Compulsory Purchase Act 1965. The effect is to limit the possible exceptions to this article to cases where part only of a house, building, factory, park or garden belonging to a house is being acquired.
- (d) Paragraph (4) confirms that Schedule 7 has effect for the purpose of modifying compensation provisions to ensure that they apply to the compulsory acquisition or creation of rights, or imposition of restrictive covenants, under this article.

Article 23 - Private rights

~~4.86~~4.82 This article provides for the extinguishment of private rights over land that is subject to compulsory acquisition pursuant to the Order. In so far as the undertaker acquires land or creates new rights over land under the Order, where the continuance of private rights over that land would be inconsistent with the exercise of the right being acquired or created then the private rights in question will be extinguished.

~~4.87~~4.83 Paragraph (3) provides that rights over the Order land that is already owned by the undertaker are extinguished on commencement of any activity authorised by the Order which interferes with or breaches those rights.

~~4.88~~4.84 Paragraph (4) provides that all private rights over land which the undertaker takes temporary possession of under the Order will be suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.

~~4.89~~4.85 Paragraphs (5) to (8) make provision for compensation and for circumstances where rights are preserved.

~~4.90~~4.86 Article 28 is based on article 22 of the model provisions. It differs from the model provisions in the following respects:

- (a) It applies to all private rights, not just private rights of way. This is to reflect the broad nature of private rights that may exist over the Order land including easements.
- (b) Paragraph (2) is included to confirm that where land is subject to the acquisition or creation of rights or the imposition of restrictive covenants, any other rights in

that land are extinguished if their continuance would be incompatible with the right or covenant being acquired or created by the undertaker.

- (c) Paragraph (3) (paragraph (2) of the model provision) is amended to refer to the Order land, rather than “the limits of land which may be acquired shown on the land plan”, and to clarify the circumstances in which other rights in land owned by the undertaker will be extinguished.
- (d) Paragraph (4) is included to clarify the position where the undertaker takes temporary possession of land.

Article 24 – Application of the 1981 Act

~~4.91~~4.87 This article applies (with minor modifications to ensure consistency between the terms of the Order and the 1981 Act) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that the undertaker has the option to acquire land via the vesting declarations procedure.

~~4.92~~4.88 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase (the other being by means of a notice to treat). They allow several parcels to be acquired at once and therefore more efficiently than under the notice to treat procedure.

~~4.93~~4.89 The modifications to the 1981 Act contained in this article can be summarised as follows:

- (a) Paragraph (3) modifies section 1(2) so that section 1 applies to the undertaker.
- (b) Paragraph (4) modifies section 5 to remove the reference to situations where the compulsory purchase order is subject to special parliamentary procedure.
- (c) Paragraph (5) omits section 5A, on the basis that the Order prescribes the time limit for compulsory acquisition in article 21.
- (d) Paragraph (6) modifies the statutory reference in section 5B(1), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders. The cross-reference to section 5A is also modified, to reflect that the time limit is set out in article 21.
- (e) Paragraph (7) modifies the statutory references in section 6(1)(b), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders.

- (f) Paragraph (9) modifies paragraph 1(2) of Schedule A1 to change the reference to compulsory purchase orders excluding land that is 9 metres or more below the surface from the counter-notice procedure.
- (g) Paragraph (10) clarifies that references to the Compulsory Purchase Act 1965 in the 1981 Act are to be construed as references to the 1965 Act as applied by section 125 of the 2008 Act and as modified by article 29, on the basis that both section 125 and article 29 modify the provisions of the 1965 Act.

~~4.94~~[4.90](#) Article 24 is based on article 23 of the model provisions. Due to extensive changes to the relevant provisions of the 1981 Act since the model provisions came into force, the wording of this article departs significantly from the model provisions.

Article 25 - Acquisition of subsoil only

~~4.95~~[4.91](#) This article allows the undertaker to acquire, or acquire or create rights in, the subsoil below land, rather than having to acquire the land itself.

~~4.96~~[4.92](#) The purpose of article 23 is to give the undertaker the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on landowners and lower payments of compensation, both of which are in the public interest.

~~4.97~~[4.93](#) This article is based on article 24 of the model provisions.

Article 26 – Modification of Part 1 of the 1965 Act

~~4.98~~[4.94](#) The purpose of this article is to ensure consistency between the terms of the Order and the Compulsory Purchase Act 1965, as applied by section 125 of the 2008 Act.

Article 27 - Rights under or over streets

~~4.99~~[4.95](#) The purpose of this article is to allow the undertaker to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.

~~4.100~~[4.96](#) The project requires to cross streets in two places and create new accesses onto existing streets in several places. This article allows those works to be undertaken without interfering with the ownership of land under and above streets which is often separately held from the highway authority interest in the street itself.

~~4.101~~[4.97](#) This article was included in the model provisions as article 27.

Article 28 - Temporary use of land for carrying out the Project

~~4.102~~4.98 The purpose of this article is to allow the land set out in Schedules 5 and 6 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Project but which is not required permanently. Article 28 also allows for the temporary occupation of any of the land intended for permanent acquisition that has not yet been acquired.

~~4.103~~4.99 The article is based on article 28 of the model provisions, with a number of changes:

- (a) First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(iii)) has been added. This allows the undertaker to occupy land without having to acquire it immediately.
- (b) Secondly, paragraph (1)(d) has been added so that permanent works specified in column (2) of Schedules 5 and 6, and any other permanent mitigation works in connection with the Project, may be left on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the Project (e.g. landscaping or ecological mitigation works).

~~4.104~~4.100 The inclusion of this article is important to ensure that the Project can be carried out efficiently and expeditiously following the making of the Order. The undertaker is entitled to either occupy and use land pending its permanent acquisition, or to temporarily occupy and use land that is not to be permanently acquired, with provision made for the restoration of the land and the payment of compensation to the affected landowners and occupiers for any loss or damage arising. These powers are considered to be reasonable given the status of the Project as a nationally significant infrastructure project.

~~4.105~~4.101 If the powers conferred by this article were not included then the undertaker would be forced to seek permanent rights over, or the permanent acquisition of, all of the land required for the Project, which would be disproportionate for those plots which have been identified as being suitable for temporary occupation and use.

Article 29 - Temporary use of land for maintaining the authorised development

~~4.106~~4.102 This article provides that the undertaker may take temporary possession of land within the Order limits, as required for the purpose of maintaining the Project, at any time within a period of five years from the date on which ~~that part of the Project is first opened for use~~the gas fired generating station first exports electricity to the national electricity

[transmission network](#). This power could be used for example to create a safe working area around the gas pipeline should maintenance works to that pipeline be required.

~~4.107~~[4.103](#) Paragraph (1)(b) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. Under paragraph (5) all temporary works must be removed before the undertaker gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.

~~4.108~~[4.104](#) This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).

~~4.109~~[4.105](#) Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.

~~4.110~~[4.106](#) Paragraphs (6) to (8) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.

~~4.111~~[4.107](#) This article was included in the model provisions as article 29.

Article 30 - Statutory undertakers

~~4.112~~[4.108](#) This article allows the undertaker to extinguish rights of statutory undertakers and remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the Land Plans and described in the Book of Reference. In practice it is impractical to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.

~~4.113~~[4.109](#) As the land over which this power may be exercised is shown on the Land Plans, and the beneficiaries of such rights are described in the Book of Reference, the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.

~~4.114~~[4.110](#) This article is based on article 31 of the model provisions. It differs from the model provisions in the following respects:

- (a) The article is expressed to be subject to article 22 and the protective provisions.
- (b) Sub-paragraph (1)(c) refers to the acquisition of rights. It also refers to the Order land rather than "within the limits of the land to be acquired and described in the book of reference".

Article 31 - Apparatus and rights of statutory undertakers in stopped up streets

~~4.115~~4.111 This article governs what happens to statutory undertakers' apparatus (pipes, cables etc.) under streets that are temporarily stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus while use of the street was restricted.

~~4.116~~4.112 Article 31 is based on part of model provision article 32. As the undertaker has only sought powers to temporarily restrict access to streets rather than stopping any street up the provisions relating to permanently stopped up streets are not applicable and have been omitted.

Article 32 - Recovery of costs of new connections

~~4.117~~4.113 This article provides that if any statutory undertaker's apparatus is removed and this halts a supply from that apparatus to owners or occupiers of premises such that they have to seek a connection to other apparatus, then their reasonable costs in obtaining a new supply can be claimed from the undertaker.

~~4.118~~4.114 This article was included in the model provisions as article 33.

Article 33 – Special category land

~~4.119~~4.115 Under section 131 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of land to which section 131 a applies (i.e. a common, open space or fuel or field garden allotment).

~~4.120~~4.116 The exception is if the Secretary of State is satisfied that certain tests under section 131(4) are met, including in this case, if the Secretary of State is satisfied that replacement land has been or will be given in exchange for the order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land (subsection (4)). The undertaker submits that this is the case, for the reasons set out in the Statement of Reasons¹⁸.

~~4.121~~4.117 The site of the main generation plant is located on common land (Walton Common). Land of a slightly larger area which has been identified in the immediate vicinity. The works necessary to make the quality of that land equivalent to the current common are included in the Order as work no. 14.

~~4.122~~4.118 Article 33 deals with the replacement of open space special category land (common) that is required for the Project. The article provides that, should compulsory powers be used to acquire the common land then, in compliance with s131(4) the replacement common land will vest in the persons from whom the common land was

¹⁸ Application document A4.2

acquired subject to all of the rights and incident (including rights of common) to which the common land was subject.

~~4.123~~[4.119](#) This article is based on article 30 of the model provisions.

Part 6 - Operations

Article 34 – Deemed Marine Licence

~~4.124~~[4.120](#) This article constitutes deemed consent (as provided for under 149A of the Act) under the 2009 Act. Schedule 8 sets out the terms on which the licence would be granted.

~~4.125~~[4.121](#) This article and the deemed marine licence follow The Port of Tilbury (Expansion) Order 2019 under exception of a number of matters which do not apply in the current facts (for example interaction with Port byelaws is not applicable to the project).

Article 35 - Felling or lopping of trees and removal of hedgerows

~~4.126~~[4.122](#) This article allows any tree or shrub that is near the project to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the Project or endanger anyone using it. Compensation is payable for any loss or damage caused.

~~4.127~~[4.123](#) Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997.

~~4.128~~[4.124](#) This article is based on article 39 of the model provisions. It differs from the model provisions in the following respects:

- (a) Paragraph (1) refers to any vegetation on or overhanging land within the Order limits, rather than any tree or shrub “near any part of the authorised project”.
- (b) Paragraphs (4) -and (5) are added to extend the powers of the undertaker to also apply to hedgerows, since these may also need to be removed in order for the Project to be carried out.

Article 36 – Works in the river Thames: conditons

[4.125](#) This article provides for [temporary](#) suspension of the public right of navigation over the river Thames situated within the Order limits where necessary to construct the Scheme. [This article also provides that, before the causeway becomes operational, the public right of navigation over any part of the River Thames that is situated within the Order limits will be permanently extinguished.](#) The article sets out the process for [temporarily and permanently](#) suspending the public right of navigation to allow the safe carrying out of works for the construction [and operation](#) of the causeway and dredging for the berthing

pocket. This involves giving notice to the PLA, getting PLA approval and the PLA then issuing a notice to mariners.

~~4.129~~[4.126](#) [This article also provides for the re-establishment of the public right of navigation where certain conditions \(set out in article 36\(10\)\) are met.](#)

~~4.130~~[4.127](#) This article follows article 22 of The Port of Tilbury (Expansion) Order 2019.

Article 37 – Power to dredge

~~4.131~~[4.128](#) This article provides a power to dredge the area of the river Thames within the Order limits for the purpose of constructing and operating Work 10 (the causeway and berthing pocket) without a separate dredging licence requiring to be obtained. The Protective Provisions for the benefit of the PLA apply to exercise of this power, [particularly in relation to the PLA's approval of dredging proposals and the payment of compensation for the sale by the undertaker of any dredged material.](#)

~~4.132~~[4.129](#) Materials dredged under the powers of this Order may not be disposed of in the UK marine licensing area except in accordance with an approval from the MMO or PLA as appropriate. In addition, requirement 12(3) concerning sediment sampling will apply to ensure that the dredged material which is contaminated is removed and disposed of appropriately.

~~4.133~~[4.130](#) ~~Paragraph 3 deems the Order is legislation falling within section 75(3) of the Marine and Coastal Access Act 2009 for the purpose of dredging activities falling within paragraph 1. This means that the exemption from the need to obtain a licence for dredging is applied to the Order and as a result maintenance dredging does not need to be listed as a licensable activity in the deemed marine licence.~~

~~4.134~~[4.131](#) This article follows article 43 of The Port of Tilbury (Expansion) Order 2019 under deletion of the parts of that article relating to operation of a harbour as they do not apply to the Scheme.

Part 7 - Miscellaneous and General

Article 38 – Protective provisions

~~4.135~~[4.132](#) This article gives effect to Schedule 9, which contains provisions protecting the interests of third parties. It was not included in the model provisions but is a standard article in development consent orders that include protective provisions.

Article 39 - Operational land for purposes of the 1990 Act

~~4.136~~[4.133](#) This effect of this article is that the land within the Order limits is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country

Planning Act 1990 and the Town and Country Planning (General Permitted Development) (England) Order 2015. Although section 264 of the 1990 Act is entitled “*cases in which land is to be treated as not being operational land*”, subsections (3) and (4) set out cases in which land is to be treated as operational land.

~~4.137~~[4.134](#) This article was included in the model provisions as article 36. This article is necessary to ensure that development is correctly classified under the Town and Country Planning Act 1990 and benefits from the appropriate permitted development rights.

Article 40 – Certification of plans etc.

~~4.138~~[4.135](#) This article provides for various application plans and documents listed to be certified by the Secretary of State as true copies of those documents following the making of the Order. This is based on article 41 of the model provisions

Article 41 - Service of notices

~~4.139~~[4.136](#) This article governs the service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient (paragraph (1)(c)), and deals with the situation of service on an unknown landowner (paragraph (4)).

~~4.140~~[4.137](#) This article was not included in the model provisions but is a sensible addition that has been included in previous orders¹⁹.

Article 42 – No double recovery

~~4.141~~[4.138](#) This article provides that compensation is not payable both under this Order and other compensation regimes for the same loss or damage. In addition, the article provides that there is not to be double recovery under two or more different provisions of this Order.

~~4.142~~[4.139](#) This article was not provided for in the model provisions but has been included in granted orders²⁰. This article simply reflects the established position that a claimant in a compulsory purchase matter shall be compensated for no more than and no less than their loss.

Article 43 – Application of landlord and tenant law

~~4.143~~[4.140](#) This article provides that agreements for the transfer of the benefit of the Order override landlord and tenant law so far as it would prejudice the operation of any agreement for leasing the whole of the authorised development or the right to operate it.

~~4.144~~[4.141](#) This article follows article 35 of the model provisions.

¹⁹ See for example article 59 of The Port of Tilbury (Expansion) Order 2019 and article 39 of The Eggborough Gas Fired Generating Station Order 2018

²⁰ See for example article 40 of The Port of Tilbury (Expansion) Order 2019

Article 44 - Arbitration

~~4.145~~[4.142](#) This article governs what happens when two parties disagree about any provision of the Order. Unless the Upper Tribunal (Lands Chamber) has jurisdiction the matter is to be settled by arbitration. If the parties cannot agree on who the arbitrator should be then this will be decided by the Secretary of State.

~~4.146~~[4.143](#) This article was included in the model provisions as article 42.

5 SCHEDULES

Schedule 1 – Authorised development

5.1 Schedule 1 describes the authorised development, which is described in detail in Chapter 2 of the Environmental Statement ([ref PDC-015](#))²¹. This has been set out in sections for the nationally significant infrastructure project and the associated development.

Schedule 2 - Requirements

5.2 The requirements in Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the Project and reflect the processes and procedures usually employed by the undertaker when implementing a Project such as this.

5.3 The requirements provide that the various details and plans to be approved must, where appropriate, reflect the measures included in the Environmental Statement. The requirements also provide that the approved Project's details and plans must be implemented as approved, unless further amendments to them are approved.

5.4 **Requirement 1** contains a number of definitions used in the requirements. This was included in the model provisions as requirement 1. [Additional definitions have been included for “discharging authority”, “navigational risk assessment”, and “requirement consultee”. The need for these additional definitions stems from some of the requirements being discharged by the MMO and the PLA.](#)

5.5 **Requirement 2** specifies the time limit for commencing the Project as being five years from the date on which the Order comes into force. This was included in the model provisions as requirement 2.

5.6 **Requirement 3** requires notification of commencement of development to be given to the relevant planning authority (Thurrock Council) [and the MMO](#). This was not included in the model provisions but has been included in other orders²² and is considered to assist the authority [and the MMO](#).

²¹ Application document A6.2.3

²² See for example requirement 2(2) of The Eggborough Gas Fired Generating Station Order 2018

5.7 **Requirement 4** provides for the approval of the detailed design prior to commencement. This is based on model requirement 4. It requires the specific design details of each of the Works or parts of them, to be submitted to and approved by the planning authority before commencement. [The exception to this is the detailed design of the causeway \(Work No 10\), which must be submitted to and approved by the MMO in consultation with the PLA prior to commencement of construction of the causeway. In respect of the remainder of the authorised development \(excluding Work No 10\)](#) ~~the~~ detailed design must include flood resilience [and flood resistance](#) measures to a flood level of up to 2.84 m above Ordnance Survey datum for critical infrastructure; that level represents the worst case flood projections taking into account climate change. Critical infrastructure means critical equipment needed to maintain safe operation of the flexible generation plant. The precise equipment which requires this level of protection will depend on the detailed design of the plant and which elements are critical will require to be agreed with the relevant planning authority. Table 1 provides the maximum parameters within which the detailed design must be progressed.

5.8 **Requirements 5 to 15** require the preparation and approval of detailed plans relating to the construction and operation of the Project.

5.9 **Requirement 16** sets out the measures for monitoring [and \(if required\) mitigating](#) operational noise and the limits for that noise.

~~5.9~~5.10 **Requirement 17** [requires a final navigational risk assessment to be submitted to and approved by the PLA, in consultation with the Port of Tilbury London Limited, prior to commencement of construction of the causeway \(Work No 10\). The requirement also sets out the need for the provision of detailed passage plan\(s\) prior to marine operations.](#)

~~5.10~~5.11 **Requirement 17**~~8~~ requires the periodic review of options for delivery of abnormal loads, and where an [environmentally acceptable, permanent, feasible and economic](#) alternative is available, requires the decommissioning of the causeway in accordance with a plan approved under **requirement 19**~~8~~. This review has been imposed to ensure that the causeway, which is necessary to allow delivery of abnormal indivisible loads for construction and where necessary replacement, is not retained for longer than it is necessary.

5.12 ~~**Requirement 19** secures bird monitoring measures requested by Natural England to ensure that the impact on birds is properly managed.~~ **Requirement 20** [restricts the operational hours of the generating station \(Work No 1A\) \(for the purposes of generating electricity\) to a maximum of 4,000 hours per calendar year.](#)

~~5.11~~5.13 **Requirement 21** [requires that all details submitted for approval of the relevant discharging authority under Schedule 2 must be in accordance with the parameters of the](#)

[environmental statement and reflect the principles set out in the certified documents \(under article 40\).](#)

~~5.12~~[5.14](#) **Paragraph 220** confirms that details approved pursuant to the requirements include any amendments that may subsequently be approved. This was included in the model provisions as requirement 37.

~~5.13~~[5.15](#) Under **paragraph 231** any steps the undertaker takes to comply with the requirements before the Order is made will be treated as effective in complying with the requirements once the Order is made, thereby avoiding the need to repeat such steps.

~~5.14~~[5.16](#) **Paragraph 242** provides that all approvals must be in writing.

~~5.15~~[5.17](#) **Part 2 of Schedule 2** provides a clear procedure for the discharge of requirements by ~~Thurrock Council~~[the relevant discharging authorities](#).

Schedule 3 – Traffic Regulation

~~5.16~~[5.18](#) This schedule specifies the existing traffic regulation order which will be suspended to allow construction of the Project.

Schedule 4 – Highways subject to temporary control or restriction

~~5.17~~[5.19](#) This schedule lists the four highways which will be subject to temporary control or restriction under the Order and refers to the plans showing the locations of such controls or restrictions. Column (3) specifies the nature of the control or restriction which may be imposed by the undertaker.

Schedule 5 – Land of which temporary possession may be taken and in which only rights etc may be acquired

~~5.18~~[5.20](#) This schedule lists the plot within which the undertaker may only acquire rights and cannot acquire ownership. The rights which the undertaker may acquire are set out in Column (2).

Schedule 6 - Land of which only temporary possession may be taken

~~5.19~~[5.21](#) This schedule lists the plot of which the undertaker may only take temporary possession and cannot acquire rights or ownership

Schedule 7 – Modification of compensation and compulsory purchase enactments for creation of new rights and imposition of restrictive covenants

~~5.20~~[5.22](#) Modifies existing compensation legislation including the Land Compensation Act 1973 and the Compulsory Purchase Act 1965 to provide for the acquisition of rights and imposition of restrictive covenants as well as acquisition of ownership of the land.

Schedule 8 – Deemed Marine Licence

[5.23](#) This schedule sets out the deemed marine licence which would be granted as part of the Order and the conditions applying to that licence. It also sets out a process for discharging those conditions. At the time of writing there is no process for appeal of any decision. The undertaker is seeking to discuss this with the MMO and in particular whether the inclusion of a provision allowing decisions under the deemed licence to be appealed in the same manner as standard licence conditions can be included. This would remit appeals to the process under section 73 of the Marine and Coastal Access Act 2009, in much the same manner as decisions under the requirements are treated as if they have been made under the Town and Country Planning Act 1990.

~~5.21~~[5.24](#) The deemed marine licence also secures bird monitoring measures requested by the MMO and Natural England to ensure that the impact on birds in the marine environment is properly managed.

Schedule 9 – Protective Provisions

~~5.22~~[5.25](#) This schedule sets out a number of protections for various bodies to ensure that the powers sought in the Order are exercised appropriately.

[5.26](#) Protections for utilities ~~and electronic communication code providers~~ are routinely included in orders and are set out in ~~Parts 1 and 2~~.

[5.27](#) Part 2 provides for the protection of Anglian Water Services Limited. Whilst it is currently the position that the authorised development will not interact with any assets of Anglian Water, this Part sets out the protections that will apply should that position change.

~~5.23~~[5.28](#) Protections for electronic communication code providers are routinely included in orders and are set out at Part 3.

~~5.24~~[5.29](#) Protection has been provided for the Environment Agency is set out in Part ~~4~~[3](#). The principal reason for requiring this is that the Order would grant consent to create a gate in the sea wall defence to allow access to the causeway and the EA requires that the gate does not prejudice the effectiveness of that defence.

~~5.25~~[5.30](#) Part ~~5~~[4](#) provides for the protection of National Grid. The Project will interact with a number of national grid assets and these provisions ensure that measures to protect assets and liability for interference with assets are in place. The undertaker considers such measures are necessary because for example, overhead electrical lines are in place across much of the site and will remain in situ. These are required to be protected during construction and a process for approving works is therefore required.

~~5.26~~5.31 Part ~~65~~ sets out measures for the protection of the Port of London Authority. These are required due to the disapplication of sections of the Port of London Act by article 10.

5.32 The Project adjoins a rail line and requires use of a level crossing over that line. Part ~~76~~ therefore sets out protections for Network Rail.

5.33 Part 8 provides protective provisions for the Port of Tilbury, an operational port undertaking, with regard to the access to the authorised development.

~~5.27~~5.34 Highways England's Lower Thames Crossing DCO project will have order limits overlapping with the authorised development. Part 9 [therefore provides protective provisions relating to this interaction].